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Supreme Court of the United States,

ERROR TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

Filed Oct. 12, 1900.

OCTOBER TERM, 1900—No. 51.

THE PEOPLE OF THE STATE OF NEW YORK ON THE RELATION OF THE NEW YORK CLEARING HOUSE BUILDING COMPANY,
Plaintiff-in-Error,

against

EDWARD P. BARKER, THEODORE SUTRO AND JAMES L. WELLS, COMMISSIONERS OF TAXES AND ASSESSMENTS OF THE CITY AND COUNTY OF NEW YORK.

TAXES OF 1896.

BRIEF FOR DEFENDANTS-IN-ERROR.

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Supreme Court of the United States.

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EDWARD P. BARKER, THEODORE SUTRO and JAMES L. WELLS, Commissioners of Taxes and Assessments of the City and County of New York.

No. 51, October Term, 1900. (Taxes of 1896.)

Brief for Defendants-in-Error.

Upon July 16, 1896, a writ of certiorari was duly sued out in the New York Supreme Court, pursuant to the Laws of New York of 1880, chapter 269, and the Consolidation Act (Laws of 1882, chap. 410, sec. 821), by the New York Clearing House Building Company to review the action of the Commissioners of Taxes and Assessments of the City and County of New York in assessing the relator upon its capital and surplus (p. 28) for the year 1896 at the sum of $165,999. At the Special Term the writ was dismissed (p. 29; 23 Misc.,

192). The opinion of the Court is at pages 30–33. The relator appealed (pp. 29, 30) to the Appellate Division of the Supreme Court, which affirmed the judgment of the Special Term without opinion (p. 33; 31 App. Div., 315). The relator then appealed to the Court of Appeals (p. 34), which again affirmed the judgment without opinion (p. 2; 158 N. Y., 709). The relator thereupon sued out this writ of error (pp. 35–37).

Statement.

This proceeding was brought under the provisions of chapter 908 of the Laws of 1896 to review an assessment against the capital and surplus of the relator for purposes of taxation for the year 1896, fixed by the respondents at $165,999.

The Deputy Tax Commissioner assigned to that duty assessed the personal property of the appellant for purposes of taxation for the year in question at $900,000 (p. 28). The relator, claiming to be aggrieved by that assessment, filed with the respondents on January 17, 1896, a statement purporting to disclose its condition for the purposes of assessment on the second Monday of January, 1896, in which it stated its total gross assets at $1,094,944, the capital stock actually paid in or secured to be paid in at $900,000, its total indebtedness at $329,050 and the assessed value of its real estate at $350,000 (p. 21).

If the respondents had acted finally upon that exhibition of its assets, or had rested upon their strict legal right to refuse to receive or file or act upon any subsequent application, relator would have been properly assessable at $415,895.

Under date of March 7, 1896, a second application was submitted by the relator and received by the respondents, in which the following statements appeared (pp. 22, 23).

Total gross assets:	
Real estate	$600,000 00
Personal	130,049 02
	$730,049 02
Capital stock actually paid in, or secured to be paid in	900,000 00
Amount of surplus earnings	None.
Rate of dividend for last year, or last annual dividend	None.

Indebtedness in detail, as follows:

Moneys borrowed	$230,000 00
Money owing on building contract	99,050 28

Q. Has any portion of above indebtedness been contracted or incurred in the purchase of non-taxable properties or securities, or for the purpose of evading taxation?

A. No.

Assessed value of real estate, $600,000.

Describing particularly by Ward and Ward map numbers.

Ward 1, Map No. 1208, Cedar street.

NOTE 1.—*The lots and building cost the Company about* $965,000, *but the building was constructed especially for the business of the New York Clearing House Association and is not adapted for any other use, so that its market value is not equal to its cost. Furniture, etc., cost* $25,069.14; *cash in bank,* $104,979.88.

Amounts invested in the stocks of other Corporations which are taxed upon their capital	None.
Amount invested in United States securities	None.

(If the stock of the Company is worth less than par state the actual value, and give the facts under oath which will justify such estimate of its value.) The stock on January 13, 1896, was worth less than par, for the reason that the Company owned no property of any kind except its real estate as above, which is assessed for $600,000, and personal property of a value not exceeding $130,049.02, and the Company owed $329,050.28. The stock is worth less than the cost of the Company's real estate.

The principal office or place of transacting the financial business of the said Corporation is situated in the First Ward of the City of New York, at No. 77 Cedar street.

City of New York, *ss.:*

I, George G. Williams, the President of the said Corporation, being duly sworn, do hereby certify and declare that the foregoing statement is in all respects just and true.

G. G. WILLIAMS,
President.

Sworn to before me this 7th day of March, 1896.

EDWARD P. BROWN,
Notary Public,
Kings County.

Certificate filed in New York County.

[NOTARIAL SEAL.]

The Commissioners did not accept as true the allegation contained in the statement of March 7 that the market value of the relator's real estate was "not equal to its cost," which had been stated at "about $965,000," but determined that the actual value of such real estate was $965,000 (pp. 19, 20). Adding to this

amount the value of the personalty ($130,049), the Commissioners found the total gross assets of the relator to be $1,095,049, the sum originally stated by the relator, and determined the actual value of the relator's capital liable to assessment as follows:

Total gross assets.		$1,095,049
Deductions:		
Debts....	$329,050	
Assessed value of real estate ..	600,000	
		929,050
Leaving a taxable balance of.... ..		$165,999

at which amount the assessment was finally fixed (p. 20).

Although the petition alleges an erroneous notice of the amount at which the assessment had been fixed as a cause of grievance (p. 6), that specification was orally withdrawn at Special Term, and was not urged on the hearing below.

In its petition for a writ of certiorari herein the relator claimed that it had no personal property or capital stock subject to assessment (p. 7), and that the decision of the respondents was therefore illegal (p. 7). The basis of this claim was that the total gross assets should be taken at $730,049, and not at $1,095,049, the difference being due to the different valuations of *real estate* adopted by the respective parties. Taking the gross assets at $730,049, there would remain no basis for assessment of capital after making the proper deductions (p. 6).

[It may be noted, in passing, that the claimed deduction of $90,000 as ten per cent. of relator's capital was improper, because the relator had no *surplus* after deducting its debts of $329,050.]

In addition to the claim of *overvaluation* of its assets, as regards its real estate, the relator makes the further claim of *illegality*. It contends that the construction of chapter 456, Laws of 1857 (under which the assessment was made) adopted by the respondents "renders the statute unconstitutional" (p. 7). This claim will be considered later.

The Court at Special Term dismissed the relator's writ on the merits (p. 29). In the opinion rendered Mr. Justice Beekman sustained the decision of the respondents as to the value of the real estate (pp. 30-33), and the order of the Special Term was unanimously affirmed by the Appellate Division (p. 33) without opinion (p. 34), on the opinion in the Court below (31 App. Div., 316), and so by the Court of Appeals (158 N. Y., p. 709).

The question of fact relating simply to the *value* of relator's *capital and surplus* has been determined in favor of the Commissioners of Taxes.

The only question, then, that remains for discussion on this appeal is the claim of illegality, and *that* claim is based on the contention that the *method* by which the Commissioners of Taxes determined the *actual value* of *the capital and surplus* of the plaintiff in error, under the provisions of chapter 456 of the Laws of 1857, if the construction of that act warrants such a *procedure*, renders that law unconstitutional.

POINTS.

I.

Upon the facts found, the assessment of the relator's capital was in strict conformity with the law.

The respondents were governed in their action by the provisions of chapter 456, Laws of 1857, section 3:

> "Sec. 3. The *capital stock of every company liable to taxation*, except such part of it as shall have been excepted in the assessment-roll, or as shall have been exempted by law, together with its surplus profits or reserved funds, exceeding 10 per cent. of its capital, *after deducting the assessed value of its real estate*, and all shares of stock in other corporations actually owned by such company, which are taxable upon their capital stock under the laws of this state, *shall be assessed at its actual value*, and taxed in the same manner as the other personal and real estate of the county."

Upon the facts in the present record the italicised portions of the section are the only ones to be regarded, the other provisions having no application. The assessed value of the relator's real estate was $600,000. The "actual value" of its "capital stock" was the only other element required.

Whatever uncertainty may have existed as to the meaning of the words "capital stock," as used above, was dispelled by the opinion of the Court in *People* ex rel. *Union Trust Co.* vs. *Coleman*, 126 N. Y., 433, which has been the guide of assessing officers since 1891. In that case the words "capital stock" were said to relate to the capital of the company, and not the shares of the stockholders; and "capital" was defined to mean *property*

(not including *franchises*), whether real or personal, or both—in other words, the company's tangible assets or good credits.

In framing the proper rules of assessment of corporate capital the Court said that the capital "must be assessed at its own value, and when that is correctly known and ascertained no other value can be substituted for it."

In the present case the respondents followed the rule. They had ascertained the value of the relator's property to be the sum of $1,095,049, subject to debts amounting to $329,050, leaving a balance of $765,999 as the *actual value* of the relator's "capital." The deduction of the *assessed value* of relator's *real* estate ($600,000) left for assessment as capital the sum of $165,999, which was the amount fixed by the respondents.

II.

The fact that in determining the actual value of the relator's capital stock the real estate was taken at its actual value and that only the ASSESSED value of such real estate was deducted did not render the assessment illegal.

> "It is the general purpose of the statutes in relation to assessments and taxation to secure an assessment upon all property, real and personal, at its actual value, and they must be construed and enforced with this purpose constantly in view."
>
> *People* ex rel. *Twenty-third St. Ry. Co.* vs. *Commrs.*, 95 N. Y., 556.

In the light of the decision of the Court in *People* ex rel. *The Equitable Gas-light Company* vs. *Barker*, 144

N. Y., 94, the question as to the legality of the relator's assessment cannot be regarded as an open one. If the rule contended for by the present appellant had been applied in that case, the assessment of capital stock would have been canceled. In the *Equitable* case the statement furnished to the Commissioners disclosed following condition (p. 98):

Total gross assets..... ...		$2,556,883 43
Comprising:		
Real estate (as *assessed*).	$1,515,400 00	
Personal property.....	1,041,483 43	
		$2,556,883 43

In the personal property was included an item of patent rights and franchises valued at $500,000, and the debts of the company amounted to $2,839,192.98. Thus the debts apparently exceeded the entire assets of the company, leaving nothing for assessment as capital stock. The Commissioners, however, did not accept as binding the valuation of the real estate made by their deputy, but found that the actual value of such real estate was so great that, when added to the personal property, the total valuation over and above the debts left the capital ($4,000,000) unimpaired. They accordingly deducted from the par value of the capital the *assessed* value of the real estate and the value of the patent rights and franchises, and assessed the balance ($1,972,700) as capital stock. This result was approved by the Court.

It may be noted that the decision in the *Equitable* case was made in December, 1894, before the new Constitution became operative. The Court, therefore, examined the record to ascertain whether the valuation of the property was justified. In the present case the question of fact as to valuation, having been determined below, is not before the Court for review.

The unanimous opinion of the Court in the case last cited was relied on by Mr. Justice Beekman as the basis of his decision at the Special Term herein (pp. 30–33).

Counsel for the appellant have argued in the courts below that the conclusion reached by this Court in the *Equitable Gas-light* case is not consistent with the provisions of the statutes relating to taxation. They have adopted, in preference, the opinion of Mason, *J.*, in *People* ex rel. *The Citizens' Gas-light Company of Brooklyn* vs. *The Board of Assessors*, 39 N. Y., 81, wherein the several laws (including chapter 456, Laws of 1857) are considered. But the decision was not concurred in by Judges Grover, Clerke and Miller, and was unanimously repudiated by the Court in the case of the *Twenty-third Street Railroad Company*, 95 N. Y., 562:

> "All that was said there was not necessary to "the decision of that case, and we think the con- "struction we have given to the statutes is more "likely to give just results and to effectuate the in- "tention of the law makers."

The opinion in the last-cited case was criticised in *People* ex rel. *Union Trust Co.* vs. *Coleman*, 126 N. Y., 445, but not as to the point naw considered—the right to deduct the *assessed* value of real estate from the *actual* value of the capital and surplus.

III.

The construction of the statute sanctioned by the Courts of the State of New York in sustaining the assessment against the "capital and surplus" of the relator does not render the statute under which such assessment was made unconstitutional.

The petition sets forth the constitutional objection relied on by the plaintiff in error in the following words (p. 7, fol. 8):

> "The Fourteenth Amendment to the Constitution of the United States provides (sec. 1) that "no state 'shall deny to any person within its jurisdiction the equal protection of the laws.' Corporations are persons within the meaning of this "provision. The Commissioners of Taxes and "Assessments have adopted an erroneous construction of the statute in question, in "that they have construed it as subjecting "the petitioner, because it owns real estate, "to taxation not only upon the *assessed* "value of the real estate, but also upon its *actual* "*cost, although the assessed value* is the *same as the* "*actual value and much less than the actual cost.* "This construes the statute as imposing on one "class of persons—namely, corporations—taxation "at a greater rate than upon another class of "persons by reason of ownership of property "identically similar in character. Obviously "such a construction renders the statute unconstitutional."

When the assessment involved in the proceeding at bar was made, section 3 of chapter 456 of the Laws of 1857 was the law in force. This particular pro-

vision of the statute was repealed and continued by section 12 of the revision of the laws relating to taxation in the State of New York, known as the Tax Law, in chapter 908 of the Laws of 1896. As the assessment relating to the taxes of 1897 are now before the Court, and as the assessment relating to that year was made under the Tax Law, and as the effect of certain words in the Statute of 1857 and omitted in the Tax Law may be material, we print the two provisions in parallel columns.

Laws of 1857, chapter 456, section 3 :

"Sec 3. The capital stock of every company liable to taxation, except such part of it as shall have been excepted in the assessment-roll, or shall have been exempted by law, together with its surplus profits or reserved funds, exceeding ten per cent. of its capital, after deducting the assessed value of its real estate, and all shares of stock in other corporations actually owned by such company, which are taxable upon their capital stock under the laws of this state, shall be assessed at its actual value, *and taxed in the same manner as the other personal and real estate of the county.*"

Assessment of* 1896 *made under this provision.

Section 12, chapter 908, Laws of 1896 (Tax Law).

"Sec. 12. *Taxation of Corporate Stock*—The capital stock of every company liable to taxation, except such part of it as shall have been excepted in the assessment-roll, or shall be exempt by law, together with its surplus profits or reserve funds exceeding ten per centum of its capital, after deducting the assessed value of its real estate, and all shares of stock in other corporations actually owned by such company which are taxable upon their capital stock under the laws of this state, shall be assessed at its actual value."

(Revisers' Note—L. 1857, chap. 456, sec. 3 ; R. S., 8th ed. 1086, without change).

Assessment of* 1897 *made under this provision.

It will be observed that section 12 of the Tax Law of 1896 re-enacted section 3 of the Act of 1857 (chapter 456) without any change of language except the omission of the portion thereof above italicized including the closing words:

> "and taxed in the same manner as the other "personal and real estate of the county."

It seems idle, in tracing the history of the provisions of the statute relating to the assessment and taxation of corporations, with a view to determining what was the force to be given to the words contained in the Act of 1857, omitted in section 12 of the Tax Law to go back of the amendment or revision of section 10 of title 4 of chapter 13 of part 1 of the Revised Statutes as amended by chapter 564 of the Laws of 1853.

The closing words of section 3 of the Act of 1857, omitted from section 12 of the Tax Law, as above stated, were left over in such section 3 as a meaningless survival from said section 10 as amended by the Act of 1853, which, as so amended, read as follows:

> "Sec. 10. The capital stock of every company liable to taxation, except such part of it as shall have been exempted in the assessments under the previous sections of this title, together with its surplus profits or reserved funds exceeding ten per cent. of its capital, after deducting the assessed value of its real estate, and also the real estate of every such company, shall be assessed and *taxed in the same manner as the other personal and real estate of the county*, unless such company shall be entitled to commute, as by the provisions of the preceding section, and shall elect so to do."

It will be noticed that the gist of section 3 of the Act of 1857 was to require capital stock and surplus profits to "be *assessed* at its actual value" instead of requir-

ing the same to "be *assessed* and taxed in the same manner as the other personal and real estate of the county," as was provided by section 10 as amended by the Act of 1853. The words "and *taxed* in the same manner as the other personal and real estate of the county" thus taken over from such section 10 into section 3 of the Act of 1857 were mere surplusage; their entire force in section 10, so far as they had significance in that section being entirely destroyed, and being intended to be destroyed, as the principal change made and intended to be made in the substance of the law by the Act of 1857. It should be noticed also that, in such section 10, the language was that the capital stock and surplus profits "shall be *assessed* and taxed in the same manner as the other personal and real estate of the county," the word "*assessed*" being the significant word of this clause of section 10, and that the word *assessed* was dropped out when this clause was taken over from section 10 into section 3 of the Act of 1867; and that an entirely different mode of *assessment* was provided by said section 3. It would follow of necessity that the property so *assessed* under said section 3 would inevitably be *taxed* in the same manner as the other personal and real estate of the county by virtue of the other provisions of the statutes requiring the proper officials to extend the tax uniformly upon all assessed valuations.

Such has been judicially declared to be the meaning, *or rather the entire absence of meaning*, in these closing words of section 3 omitted from the present section 12 of the Tax Law. The General Term Supreme Court, in People *ex rel.* Broadway, etc., R. R. Co., *vs.* Tax Commissioners of New York City, I., T. and C., 635, at p. 638, per Ingraham, said, referring to these closing words of section 3 of the Act of 1857:

> "It was said on the argument that the statute re-
> "quired the *assessment* to be made in the same

"manner as other personal and real estate of the "county. These words did not apply to the *assess-* "*ment* but the *taxation*, so as to call for the same "rate on the valuation as is applied to personal and "real estate."

And the Court might well have added that these words were mere surplusage, and if stricken out from section 3 of the Act of 1857 precisely the same result would remain by reason of the other statutes requiring the Supervisors to extend the tax by a uniform rate on all assessed valuations.

It is evident, therefore, that the Commissioners of Statutory Revision knew what they were doing when they added, after section 12 of the proposed Tax Law, as reported by them to the Legislature, the following note:

"L. of 1857, ch. 456, sec. 3; R. S., 8th ed., 1086, "without change" (Report of the Commissioners "of Statutory Revision, 1896, p. 25).

It is clear, then, that the grievance set up in the petition following the claim of unconstitutionality, as follows:

"Moreover, it is inconsistent" (that is, the construc- "tion of the statute complained of) "with the pro- "visions of the Revised Statutes that 'the real estate "'of all incorporated companies, and liable to tax- "'ation, shall be assessed in the town or ward in "'which the same shall lie *in the same manner* as "'the real estate of individuals' (1 R. S., 389, sec. "6). It is inconsistent, too, with the provisions of "chapter 456 of the Laws of 1857 that the capital "stock of every company liable to taxation shall be "taxed *in the same manner* as the other real and "personal estate of the county."

have no force since there is no pretense or claim or allegation that the property of this corporation has not been

taxed the same rate as all the other property in the county.

It is obvious that the objection is founded on a mistake of fact. In the case of corporations, as in the case of individuals, the law requires an assessment of real estate at its actual *value*, not at its actual *cost*. In the present case the record shows that the *cost* and *value* of the property were the same. Whatever force there may have been in the objection when originally made has been nullified by the finding of the Courts below.

If any criticism were to be made of chapter 456, Laws of 1857, section 3, providing for the assessment and taxation of corporate capital, it would probably be that it *unduly favored* corporations as against individuals; for it exempts from all taxation surplus profits or reserve funds equal to ten per cent. of the capital. Would not the successful merchant welcome such a provision for his benefit?

But we think the radical error pervading the appellant's argument is the assumption that corporations and individuals must be treated in all respects alike in the matter of taxation. The Constitution of the State imposes no such restriction on the Legislature. It would be competent for that body to tax corporations on their real estate and relieve individuals. The only requirement is that corporations of like character shall be similarly treated under similar conditions.

> "When legislation applies to particular bodies or associations, imposing upon them additional liabilities, it is not open to the objection that it denies to them the equal protection of the laws IF ALL PERSONS BROUGHT UNDER ITS INFLUENCE ARE TREATED ALIKE UNDER THE SAME CONDITIONS."
>
> Missouri Pacific Ry. Co. *vs.* Mackey, 127 U. S., 205, 209.

A proper enforcement of the provisions of the Act of 1857, under which the respondents proceeded, could never result in an illegal assessment.

And, of course, no statute can be rendered unconstitutional by a failure to comply with its provisions.

It is admitted that classification for purposes of taxation, distinguishing simply between different kinds of property, is entirely within constitutional provisions. It is equally clear, we think, that it was never the purpose or intent of the system in the State of New York to assess for purposes of taxation individuals and corporations in the same way. This arises from the fact that corporations are assessable upon their *capital and surplus*, whereas individuals are assessable not upon their property as a *whole*, but upon their property as divided into real and personal. The classification, therefore, relates to different kinds of property. The capital and surplus of the corporation relating to property which includes as a unit for purposes of assessment the actual value of its tangible assets, whether represented by real or personal property. Whereas, in the case of an individual, classification for purposes of assessment of the property owned is distinctly divided into two kinds of property, real and personal, not assessed for purposes of taxation as a unit, as in the case of corporations. Moreover, in the State of New York corporations are allowed by way of arbitrary deduction surplus profits or reserve funds exceeding ten per cent. of its capital.

IV.

There is no iron rule of equal taxation.

This court said in a well known case:

"The provision in the Fourteenth Amendment, "that no State shall deny to any person within its "jurisdiction equal protection of the laws, was not "intended to prevent a State from adjusting its "system of taxation in all proper and reasonable "ways. It may, if it chooses, exempt certain classes "of property from any taxation at all, such as "churches, libraries and the property of charitable "institutions. It may impose different specific taxes "upon different trades and professions and may vary "the rates of excise upon various products; it may "tax real estate and personal property in a different "manner; it may tax visible property only, and not "tax securities for payment of money; it may allow "deductions for indebtedness, or not allow them. "All such regulations, and those of like character, "so long as they proceed within reasonable "limits, and general usage, are within the dis- "cretion of the State Legislature, or the people "of the State in framing their Constitution. But "clear and hostile discriminations against particu- "lar persons and classes, especially such as are "of an unusual character, unknown to the practice "of our Governments, might be obnoxious to the "Constitutional prohibition. It would, however, be "impracticable and unwise to attempt to lay down a "general rule or definition on the subject that would "include all cases. They must be decided as they "arise. We think that we are safe in saying that the "Fourteenth Amendment was not intended to compel "the State to adopt an iron rule of equal taxation. "If that were its proper construction it would not

"only supersede all those Constitutional provisions "and laws of some of the States, whose object is to "secure equality of taxation, and which are usually "accompanied with qualifications deemed material, "but it would render nugatory those discriminations "which the best interests of society require."

Bell's Gap. R. R. Co. *vs.* Pennsylvania, 134 U. S., 232-237.

V.

The Constitution of the State of New York contains no clause prescribing equal taxation.

This being the case the plaintiff in error must show a violation of the Fourteenth Amendment of the Constitution of the United States.

VI.

A failure to comply with its provisions cannot render a statute unconstitutional.

The entire attack of the plaintiff-in-error is not against the statute itself, but against the failure of the Commissioners of Taxes and Assessments of New York City and county to comply with its provisions requiring taxation of the capital stock of the plaintiff-in-error at its actual value and in the same manner as the other personal and real estate of the county.

Cummings *vs.* Nat. Bank, 101 U. S., 153, 161.

VII.

The fact is conclusively established that the plaintiff in error has not been aggrieved by the assessed valuations of its property.

It is established by the record that the actual value of the relator's property, over and above debts, was $765,999. The real estate was assessed at $600,000; the balance of the capital stock at $165,999.

As matter of fact, *the relator has benefited by this method to the extent of the tax on about* $200,000; for if the real estate had been assessed, *as such*, at its actual value, which was found to be $965,000, the assessment-rolls would have stood thus:

Real estate roll	$965,000 00
Personal estate (capital stock)	Nothing

By the method actually adopted, the relator has practically been allowed to apply *all of its debts* ($329,050) against its gross assets (including real estate), whereas the law contemplates that an allowance for debts shall be made only in the assessment of *personal property*.

Even if it were assumed, for argument, that an erroneous method had been adopted, the result reached was much more favorable to the relator than if the method proposed by the relator had been adopted.

As the Court said in the Equitable Gas Light case (144 N. Y., 101): "We are not here concerned with any question of inequality of assessment as between the relator and other taxpayers." No suggestion of inequality appears upon the record. But the fact re-

mains that if the Act of 1857 is always applied as it has been in this case, and assessing officers do their duty also in valuing the property of individuals, all the taxable property in the State will be assessed once, and once only, at its actual value, and the harmony of our system of taxation will be maintained.

Under the law of the State of New York, in the proceeding at bar, before the plaintiff-in-error would be entitled to a correction of the assessment as fixed by the defendants-in-error it would be required to prove affirmatively that it had been aggrieved and that the value of its capital and surplus as fixed was in excess of its *actual value*, irrespective of the method by which that result was reached.

Section 821 of the Consolidation Act, being chapter 410 of the Laws of 1882, the special provision of the statute in force in the assessment under review, and indeed when the assessment for 1897 was made, read as follows:

> "Sec. 821. A certiorari to review or correct, on the merits, any decision or action of the commissioners, under either of the preceding sections, shall be allowed by the Supreme Court or any judge thereof, directed to the said commissioners *on the petition of the party aggrieved*, but *only* on the grounds which must be specified in such petition, that the assessment is illegal, and giving the particulars of the alleged illegality, or is erroneous by reason of over-valuation."

This provision of the Consolidation Act was in entire accord with the provisions of the General Tax Law in that regard, as contained in section 250 of chapter 908 of the Laws of 1896, limiting the right to review assessments for taxation to persons claiming to be aggrieved. The Court of Appeals of the State of New York have

finally settled the proposition, that while the methods by which a result is reached in fixing the value of property for taxation may be erroneous, that if that result is such, that from the assessment as fixed no grievance results, the courts will not interfere with the determination of assessing officers upon questions of value and appraisal.

People *ex rel.* Equitable Gas Light Co. *vs.* Barker, 73 Hun, pp. 23, 24 and 28; affirmed, 137 N. Y. Rep., p. 544.

VIII.

The meaning of "Tax in the same manner" in the statute.

The meaning of these and similar words in statutes simply is that *the form* must be the same in all cases.

Peo. *ex rel.* Thurber-Whyland Company *vs.* Barker, 141 N. Y., 118.

IX.

The Cases Cited by the Plaintiff-in-Error.

Without going into a detailed examination of all the cases cited in the learned brief of plaintiff-in-error, it will be found that they are divided into several general classes, and that they are distinguishable from the case at the bar.

The first class, of which Cummings *vs.* National Bank, 101 U. S. 153, is the type, are cases which construe the statute in relation to national banks, and in which the facts and statutes are very different from those of the present case.

The second class of cases is that of cases brought to obtain an injunction against the action of Tax Commissioner.

Even in this class of cases this Court has lately held that the collection of taxes under the authority of a State will not be enjoined by a Court of the United States on the sole ground that the tax is illegal, but it must appear that the party taxed has no adequate remedy by the ordinary process of law, and that there are special circumstances bringing the case within the same recognized head of equity jurisdiction.

> Arkansas Building Ass'n *vs.* Madden, 175 U. S. 269.

But taking this class of cases we find a fact which distinguishes them absolutely from the case at bar.

In these cases there was present the fact that there was evidence of inequality.

An illustration of the class of injunction cases cited by plaintiff in error is Taylor vs. Louisville & N. R.R. Co., 88 Fed. Rep., 350, which was a case in the Circuit Court of Appeals in the Sixth Circuit. That was an action brought by the railroad company against a board of equalization of the State of Tennessee to enjoin it from certifying, in accordance with a statute of Tennessee, a tax valuation upon complainant's railroad, to be apportioned by the State Comptroller to the thirty-five counties, cities and towns in which the railroad lies.

The holding of the Circuit Court of Appeals is correctly stated in the head-note, as follows:

> " Under the Tennessee Constitution of 1870 (Article 2, sec. 28), declaring that all property shall be " taxed 'according to its value,' to be ascertained as " the Legislature shall direct, 'so that taxes shall be " equal and uniform throughout the State,' when it " is the uniform practice in the various counties of " the State to assess real property at not exceeding " 75 per cent. of its true value, an assessment upon " railroad property at its full value violates the uniformity of taxation which is the main purpose of " the constitutional provision, and will be enjoined, " although this involves a violation of the letter of " the State Statute passed pursuant to the Constitution, which requires all property to be assessed at " its full value.
>
> " Equity will not enjoin an assessment of property " at its full value, on the ground of inequality resulting from the assessment of other property at less " than its full value, unless it appears that the assessing officers, whose acts of undervaluation create the " unjust burden, intentionally and habitually violate " the law by assessing property at less than its true " value."

We have in this case *a constitutional provision* of the State which is violated, and an examination of the opinion of the Court shows that there was a very exhaustive *trial of the question of fact* upon which the Court based its opinion.

The Circuit Court of Appeals said:

> " We find from the evidence, which is uncontradicted, that generally in the State of Tennessee for a number of years the assessors and the " board of equalization of each county have in-

" tended to assess and have assessed real and per-
" sonal property at a uninform percentage less
" than its real value; that this percentage is not
" uniform between the counties, but that it is not
" substantially less than 25 per cent. in any of
" them. We base our conclusion on 150 affidavits
" contained in the record. They do not cover spe-
" cifically more than 35 counties out of the 96 coun-
" ties in the State; but when they are supplemented
" by the evidence of the members of the State
" Board of equalizers * * * we have no diffi-
" culty in finding the fact to be as above stated."

Taylor *vs.* Louisville & N. R. R. Co., 88 Fed. Rep., 362.

It may be said that each case cited by the plaintiff in error where an injunction was granted it was only granted after a careful examination of the facts outside of the allegations of the pleadings.

X.

Conclusion—The judgment should be affirmed.

For the foregoing reasons it is respectfully asked that the judgment herein be affirmed.

THEODORE CONNOLY,
JAMES M. WARD,
Counsel for defendants-in-error

Appendix.

STATUTES OF THE STATE OF NEW YORK.

1. Revised Statutes, 389, section 1, 9th ed., p. 1680:

> "Every person shall be assessed in the town or "ward where he resides when the assessment is "made for all lands then owned by him within "such town or ward, and occupied by him, or "wholly unoccupied."

Id., section 17, 9th ed., p. 1685:

> "All real and personal estate liable to taxation "shall be estimated and assessed by the assessors "at its full and true value, as they would appraise "the same in payment of a just debt due from a "solvent debtor."

Laws of 1857, 456, section 3.

> "The capital stock of every company liable to "taxation, except such part of it as shall have "been exempted in the assessment roll, or as shall "have been exempted by law, together with its "surplus profits or reserved funds, exceeding ten "per cent. of its capital, after deducting the "assessed value of its real estate, and all shares "of stock in other corporations, actually owned "by such company, which are taxable upon their "capital stock under the laws of this State, shall "be assessed at its actual value and taxed in the "same manner as the other personal and real "estate of the county."

Consolidation Act, chapter 410, Laws of 1882, section 814:

> "It shall be the duty of the deputy tax com-"missioners, under the direction of the commis-

" sioners of taxes and assessments, to assess all the
" taxable property in the several districts that may
" be assigned to them for that purpose by said
" commissioners, and they shall furnish to them,
" under oath, a detailed statement of all such
" property showing that said deputies have per-
" sonally examined each and every house, build-
" ing, lot, pier or other assessable property, giving
" the street and ward map number of such real
" estate embraced within said districts, together
" with the name of the owner or occupant, if
" known; also, in their judgment, the sum for
" which such property under ordinary circum-
" stances would sell, with such other information
" in detail, relative to personal property or other-
" wise, as the said commissioners may from time to
" time require. Such deputies shall commence to
" assess real and personal estate on the first Mon-
" day of September in each and every year."

Nos. 51 and 52

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Sup. Ct. Br. of Connoly & Ward for D

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Supreme Court of the United States.

ERROR TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

OCTOBER TERM, 1900—NOS. 51, 52.

THE PEOPLE OF THE STATE OF NEW YORK on the relation of the NEW YORK CLEARING HOUSE BUILDING COMPANY,
Plaintiff-in-Error,

against

EDWARD P. BARKER, THEODORE SUTRO and JAMES L. WELLS, Commissioners of Taxes and Assessments of the City and County of New York.

Synopsis of Oral Argument.

1. The Grievance Specified in the Petition.

When these proceedings to review the assessments against the capital and surplus of the plaintiff-in-error were brought, the proceedings were regulated by certain statutory provisions contained in section 250, chapter 908 of the Laws of 1896 (the Tax Law of the State of New

York), as those provisions were modified or qualified by section 821 of chapter 410 of the Laws of 1882 (the Consolidation Act of the City of New York).

The provisions of the Consolidation Act in force up to January 1, 1898, were in part as follows:

> "Sec. 821. A certiorari to review or correct on the "*merits* any decision or action of the commissioners "under either of the two preceding sections shall "be allowed by the supreme court or any judge "thereof directed to the said commissioners on the "petition of the party *aggrieved*."

By reference to the printed record herein, page 7, folio 8, it appears that the only grievance attempted to be alleged *against the tax law* of the State of New York, or the *construction of that law* by the Commissioners of Taxes, involved an over-valuation of relator's real estate, and *not* a mere *method of assessment* peculiar to corporations. The particular portion of the record to which we now allude is set forth on page 11, Point III., in the brief for the defendants-in-error. The allegation of the petition is:

> "The commissioners of taxes and assessments "have adopted an erroneous construction of the "statute in question, in that they have construed it as "subjecting the petitioner, because it owns real estate, "to taxation not only upon the *assessed* value of "the real estate, but also upon its *actual cost* although "the *assessed value* is *the same as the actual value* "and *much less* than the *actual cost*."

In other words, the petitioner alleges that its real estate was assessed at its *cost* although its *actual value* was *less* than its *cost*. This is an allegation of *over-valuation* pure and simple, and in the determination of *that* question by the courts of the State of New York was distinctly involved, under the provisions of section 821 of the Consolidation Act, the action of the Commissioners *on the merits* in fixing the valuation.

Throughout the argument of the plaintiff-in-error, it is assumed here that the question to be resolved is, whether the action of the Tax Commissioners subjects the relator, merely because it is a corporation, to a rule of taxation more onerous than that applied to an individual owning the same property. The allegations in the petition present no such question for determination in this Court.

2. The Intent of the Statute.

It is obvious that the Legislature intended to secure throughout the entire State an equal assessment of property, both real and personal, and whether owned by individuals or corporations, and as already pointed out in our brief, page 8, Point II, the Court of Appeals have declared that the general purpose of our statutes in relation to assessment and taxation is to secure an assessment on *all* property "at its *actual value* and that they must be *construed* and *enforced* with *that* purpose constantly in view."

We cannot, therefore, concede, as counsel for petitioner aver that we do, that

> "the *statute* attempts to classify the property assessed "solely with reference to its ownership—namely, by "individuals or by corporations, and to apply a more "onerous rule of taxation to the same property if it "be owned by a corporation than that to which it "would be subject if it were owned by an indi-"vidual."
>
> Brief in reply to plaintiff-in-error, page 2.

So far from conceding any such "attempt" on the part of the statute, we emphatically and persistently deny that the particular act applying to the assessment of the capital stock of corporations, or the entire system of taxation in force in the State of New York, lends any support to the suggestion of inequality, as between the assessment of property of corporations and the assessment of property of individuals. The same rule is uniformly pre-

scribed for the valuation of all forms of taxable property. The single standard in every case is the actual value thereof.

Objection is made to the language of the statute, Laws of 1857, chapter 456, section 3, in that it provides for an assessment of the corporation upon the *actual* value of all its property, but provides for deducting only the assessed value of its real estate. It is urged that this

> " clearly recognizes that the *assessed* value of the real
> " estate will be less than its *actual* value and provides
> " that a corporation shall be taxed upon the margin
> " of difference as personal property, while an indi-
> " vidual is subject to no such tax."

Brief in reply, p. 2.

The suggestion of counsel is clearly misleading. The court of last resort in the State of New York has long since recognized that " the *assessed* value of real estate is " in *theory* its *actual value*."

People *ex rel.* Panama R. R. Co. *vs.* Commissioners, 104 N. Y., 244.

It was because the law of the State required the assessment of real estate at its actual value that it was deemed necessary to deduct the assessed value in determining the amount of capital to be assessed as such on the rolls; and it is a mattter familiar to the courts of New York that the Act of 1857, in requiring the deduction of the assessed value of real estate was regarded as protecting the interests of all parties in a more thorough manner than these interests had been protected by the tax law formerly in force. Originally it was the actual cost of the real estate that was required to be deducted in determining the value of capital; but as the value of the real estate might either diminish or increase after its purchase, the wiser and only proper rule to adopt was in every instance to require the assessment of the real estate at its actual value, and then

in the case of corporations to deduct that value as assessed before placing a valuation upon the capital, so called.

Even in the Equitable Gas Light case (144 N. Y., p. 94), cited persistently by counsel for the plaintiff-in-error in his briefs in this cause, from the opinion in that case, nothing can be spelled out in support of the theory that the Act of 1857 required the *systematic* transfer to capital and surplus account of any difference between the assessed and the actual value of the real estate of corporations. What the Court in that case *did* say, and *that* expression of opinion was based upon the *facts appearing in the record in that particular case*, was:

> "In case of corporations it *may happen* that an "under-valuation in the assessment of the real estate "as such will be corrected in its valuation as part of "the capital, and so the under-valuation may be "remedied and the whole property be subjected to "taxation at its *real value*."
>
> 144 N. Y., pp. 99, 100.

All that can be gathered from this excerpt is, that in exceptional cases, upon proof of a resulting erroneous assessment, by reason of the gross under-valuation in the assets of a corporation of its real estate, the statute permitted the correction of that error, in order that the whole property be subjected to taxation at its real value.

3. The Method of Applying the Statute.

It seems to be assumed by counsel for the plaintiff-in-error that the record establishes a construction and application of the law by the Tax Commissioners which necessarily deprived the plaintiff-in-error of the equal protection of the laws. This idea is repeated in various form throughout the argument, but it should be understood once and for all that the argument based upon this assumption, *has no foundation in the record before the Court.* There is no proof that the Commissioners or their Deputies have assessed

the real estate of individuals at less than its actual value or that, with the exception of the plaintiff-in-error, they have assessed the real estate of corporations at less than its actual value.

There is no proof or suggestion, even, that the Commissioners of Taxes have intentionally applied a different rule to corporations than the rule applicable under the law to individuals. Indeed, the argument of counsel rests in the last analysis upon certain expressions of opinion largely *obiter*, found in reported cases as to the general under-valuation of real estate, and seeks to fasten upon the Commissioners in the present proceeding, as finding of fact, a mere "observation" of the Court in some other proceeding.

We might as well urge that the Court will take judicial notice of the fact that since then tax officials have been arrested and imprisoned in the State of New York for not complying with the directions of the statute to assess the property of individuals and corporations at actual value.

We might even ask the Court to take judicial notice of the newspaper reports of committees of investigation in which it was alleged that real estate in the City of New York had been assessed entirely too high, and that, too, in the case of individual owners, but we cannot believe that the Court would seriously entertain the argument of counsel based upon no evidence, nor even upon pertinent allegations. It would, in effect, be asking the Court to pass upon a moot question of law that might never arise in actual administration, and certainly is not presented by the record in this case.

We do not dispute that if the *facts* justify the allegation of *relator's briefs*, the Supreme Court of the United States would have power, and it would be its duty to grant such relief *as the facts proved might warrant*. If the relator had *actually* been deprived of the

equal protection of the laws, it would make no difference whether that result followed from the statute or from the action of the tax officials in administering the statute, *provided the facts were proved and found in the case.* But in every instance cited by counsel for the plaintiff-in-error in his brief in reply either the law itself was obnoxious to the Constitution or it was *admitted* or *proved* that the administration of the law deprived the complaining party of his constitutional rights.

Thus, referring to page 5 of the brief in reply, in *People* vs. *Weaver*, 100 *U. S.*, 539, it appeared that the statutes of New York which permitted a party to deduct his just debts from the valuation of all his personal property did not permit such a deduction from the assessment of bank shares, and this court held that the result was to tax bank shares at a greater rate than other moneyed capital, and that therefore the New York statute was void as to bank shares and in conflict with the provisions of section 5219 of the Revised Statutes of the United States. There was no dispute in that case as to the fact that holders of National Bank shares were denied the privilege of having their debts deducted from the valuation of their bank shares, and it was conceded that this result, this denial, was practically required by the decisions of the State courts.

In *Whitbeck* vs. *The Mercantile Bank*, 127 *U. S.*, 193, it was proved that bank shares were assessed at sixty-five per cent. of their actual value, while other moneyed capital was only assessed at sixty per cent.; also that no allowance for debts was made to shareholders of banks, but that allowance was made to other owners of moneyed capital. Here again it was obvious that the complainant had an admitted grievance. It will be observed that he sought relief in *equity* and the court restrained the collection of the excess of taxes above the sixty per cent. applied to other owners of moneyed capital.

In *Scott* vs. *McNeal*, 154 *U. S.*, 34, this Court defined the issue as follows (page 39):

> "The fundamental question in the case is "whether letters of administration upon the estate "of a person who is, in fact, alive have any valid- "ity or effect as against him."

And the head-note of the report shows that the decision in that case has no bearing upon the present controversy:

> "A judgment of the highest court of a State by "which the purchaser at an administrator's sale "under order of a probate court of land of a liv- "ing person, who had *no notice of its proceedings*, "is held to be entitled to the land as against him, "deprives him of his property without due pro- "cess of law, contrary to the Fourteenth Amend- "ment of the Constitution of the United States, "and is reviewable by this Court on a writ of "error."

There was no conflict of evidence on the point that the plaintiff's land had been taken from him by a sale authorized by a probate court on the theory that he was legally dead, but when in fact he was alive, and that the proceeding had been without any notice whatever to the owner of the property.

In *Ex parte Virginia*, 100 U. S., 339, a county judge had been indicted in the United States District Court for deliberately excluding colored citizens from jury lists prepared by him under the law. The case came up on a writ of habeas corpus and certiorari. The Court held that the act of the judge in selecting jurors was ministerial and not judicial, and, although he derived his authority from the State, he was bound in the discharge of that duty to obey the Federal Constitution and the laws passed in pursuance thereof. The record showed that he had failed in the discharge of his duty by systematically and intentionally excluding colored citizens from the jury lists simply on the ground of their color.

In *Yick Wo* vs. *Hopkins*, 118 *U. S.*, 359, this Court was called upon to consider certain municipal ordinances of the City of San Francisco relating to the carrying on of the laundry business within the city limits. The ordinances by their terms required the consent of the Board of Supervisors to carry on the business within the city or county limits in other than brick or stone buildings. The evidence showed that the consent was withheld from Chinamen as distinguished from Caucasians, that the withholding of the consent was purely arbitrary and intentional and due to race prejudice, and that the right to withhold the consent was claimed under the ordinances of the City. This Court held that the ordinances violated the provisions of the Constitution, because they conferred upon municipal authorities *arbitrary power* at their own will, and without regard to discretion in the legal sense of the term, to give or withhold consent as to persons or places, without regard to the competency of the persons applying, or the propriety of the place selected, for the carrying on of the business. This clearly involved a denial of the right to equal protection of the law granted by the Constitution; and there was no attempt on the record to prove that the grievance complained of was not an actual one and that the exercise of power under the ordinances was not absolutely arbitrary. The Court then said (page 373):

> "For the cases present ordinances in actual
> " operation, and the *facts shown establish* an ad-
> " ministration directed so exclusively against a
> " particular class of persons as to warrant and re-
> " quire the conclusion that, whatever may have
> " been the intent of the ordinances as adopted,
> " they are applied by the public authorities charged
> " with their administration, and thus representing
> " the state itself, with a mind so unequal and op-
> " pressive as to amount to a practical denial by
> " the state of that equal protection of the laws
> " which is secured to the petitioners, as to all
> " other persons, by the broad and benign provis-

> " ions of the Fourteenth Amendment to the Con-
> " stitution of the United States. Though the law
> " itself be fair on its face and impartial in appear-
> " ance, yet, if it is applied and administered by
> " public authority with an evil eye and an unequal
> " hand, so as practically to make unjust and ille-
> " gal discriminations as between persons in sim-
> " ilar circumstances, material to their rights the
> " denial of equal justice is still within the prohibi-
> " tion of the Constitution."

And, again, on page 374 :

> " *The fact* of this discrimination is admitted. No reason for it is shown, and the conclusion cannot be resisted, that no reason for it exists, except hostility to the race and nationality to which the petitioners belong, and which in the eyes of the law is not justified."

In *Chicago Company* vs. *Chicago*, 166 *U. S.*, 226, several questions of law were propounded and discussed which have no application to the case at bar. The real grievance of the railroad company was that a nominal award of one dollar had been made for damage to the railroad company by reason of the opening of a city street across its tracks. The company claimed that the award was in violation of of the Fourteenth Amendment to the Constitution of the United States, and that practically its property was being taken for public uses without compensation and without due process of law. The interesting discussion as to due process of law resulted in the declaration that the requirements of the Constitution as to due process of law are not fulfilled by mere formal compliance with the rules and regulations of practice as to notice, appearance and hearing before the proper tribunal. The fact that the railroad company had notice of the proceedings to condemn the right of way and appeared before the proper tribunal and was heard would not prevent this Court from inquiring into the proceedings to determine whether the decision of the

tribunal in effect deprived the company of its constitutional rights, but the record in that case disclosed the fact as found that the damage complained of was only nominal, and therefore the judgment of the tribunal before which the company had appeared was sustained on the merits.

Thus, in all these cases and in other cases cited by counsel for the plaintiff-in-error, it appears either that the law itself was plainly obnoxious to the Constitution, or that the case was presented in such a form and with such facts that the Federal Court was able to relieve the complaining party without transcending its own jurisdiction. Here the law itself and the whole body of the law of the State relating to taxation is beyond cavil, and the want of equal protection asserted in the briefs of counsel for the plaintiff-in-error is unsupported by evidence or even by appropriate allegation, much less by findings in the courts below.

4. The Real Grievance of the Plaintiff-in-Error.

If the statements *made in the briefs of counsel* were founded *in fact*, and established on the record, its *real grievance* would be *not over-valuation* but *inequality, not* that its property had been *assessed more than it is worth*, but that the property of some others, to wit, individual owners of real estate, *had been assessed at less than its actual value.*

It is hardly necessary to repeat that there is no evidence whatever, and no finding of fact, to support the assertions of inequality ; and as the courts below have found against the claim of over-valuation, there is left nothing for this Court to consider but the bare possibility under the provisions of the Act of 1857 of such a state of facts being developed as would disclose an unequal assessment against some New York corporation. This we consider as an academic discussion. But suppose the fact were developed that in a given case under the operation of the tax laws of New York

the property of the corporation were assessed at its full value, while the real estate of individuals in the same tax district was assessed at a lesser value, it would also have to appear that the courts of New York State had refused to relieve the relator from the inequality thus produced in the administration of the law before the Federal Court would assume to interfere. There is no allegation, and there is no proof, that the courts of New York would fail to relieve against inequality if established as matter of fact.

Indeed, upon this question; that is, how far the record would justify any interference to correct a grievance springing out of inequality, we think that this Court would reach precisely the same conclusion as the Court of Appeals of the State of New York in the Equitable Gas Light case, which the learned counsel for the plaintiff-in-error has cited so frequently. Upon that point the Court of Appeals said:

> " The act of the commissioners in under-valuing
> " the real estate in its assessment as such did not
> " estop the public nor relieve them of the duty in
> " ascertaining the value of the capital to estimate
> " the real estate at its full value. *We are not here*
> " *concerned with any question of inequality of assess-*
> " *ment as between the relator and other taxpayers.*
> " *We hold that the commissioners could legally disre-*
> " *gard the assessed value of the real estate in estimat-*
> " *ing the value of the capital, and the question of*
> " *legality is the only point now in question.*"
>
> People *ex rel.* The Equitable Gas Light Company *vs.* Barker, 137 N. Y., 534.

5. The Logical Result of the Contention of the Plaintiff-in-Error.

The attack upon the Act of 1856 is based wholly upon the assumption that that act must be so construed as to afford to corporations assessed and taxed under its provisions precisely the same rights and ob-

ligations that are conferred and laid on individuals assessed and taxed under other provisions of the Tax Law in the State of New York. It is obvious that if this is so, that there being no provision in the statutes relating to the assessment and taxation of individuals in the State of New York, allowing them a deduction for any surplus or reserved funds in excess of ten per cent. of the capital, that they on the theory of the plaintiff-in-error are upon that ground denied the equal protection of the laws, and that the result would be that that system of taxation of corporation is bad, and upon the same ground that the whole system relating to the assessment of individuals and corporations is equally bad. Such a result we cannot contemplate as possible.

New York, October 22, 1900.

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